* * * *

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In the Supreme Court of the United States

ADELLA CHIMINYA TACHIONA, ON HER OWN BEHALF AND ON BEHALF OF HER LATE HUSBAND TAPFUMA CHIMINYA TACHIONA, ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE BAR HUMAN RIGHTS COMMITTEE OF ENGLAND AND WALES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*

The Bar Human Rights Committee of England and Wales (BHRC) is the international human rights arm of the Bar of England and Wales. It seeks to promote human rights and the rule of law internationally. It sends trial observers and human rights monitors to many parts of the world and publishes reports on its findings. BHRC has an interest in the development of legal standards and remedies designed to address egregious violations of internationally recognized human rights, such as those at issue in the present case. This Court has stated that it values the views of respected professional organizations and nations that share the Anglo-American legal heritage. See *Thompson* v. *Oklahoma*, 487 U.S. 815, 830 (1988). Hence, BHRC respectfully submits this brief.[1]

This case raises two issues of particular concern to BHRC: human rights abuses in Africa, and the dangers of overreaching Executive authority in democratically elected governments. With regard to the former, members of BHRC have observed trials in Nigeria, Kenya, and Tunisia, and served as human rights observers in Sierra Leone. BHRC has followed with great concern the developing human rights crisis in Zimbabwe and has condemned the ruling party's use of intimidation, delay, and biased judicial appointments to subvert the legal culture for political ends.[2]

Although standing is usually a question of domestic law, in the present case, the issue is inextricably tied to larger

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[1] Pursuant to Rule 37.6, BHRC certifies that no counsel for a party authored this brief in whole or in part, and that no person or entity other than BHRC, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

[2] ANNUAL REPORT 2004, BAR HUMAN RIGHTS COMMITTEE OF ENGLAND AND WALES 6, *available at* http://tinyurl.com/7ahc9.

questions of human rights threatened by eroding judicial independence and expanding Executive Branch power. Therefore, the Second Circuit's holding that the U.S. Government has standing to appeal, even when the defendant ruling party of Zimbabwe did not enter an appearance, serves to widen the reach of the Executive without constitutional foundation, in a way that places human rights protections in jeopardy. Accordingly, BHRC submits this brief to urge this Court to grant the petition for certiorari.

INTRODUCTION AND SUMMARY OF ARGUMENT

> The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image.[3]

Despite the well-founded "doubt" that Justice Jackson expressed in this quotation, the Executive Branch has recently attempted to expand its powers significantly beyond the limits that the Framers envisioned, at the expense of human rights. The decision below is just one example, though a tragic one. It sanctions the Government's attempt to control litigation in which it has no direct interest. The effect of the decision is to enable the Federal Government to shield a foreign governing political party that abuses its own country's citizens. As justification, the Second Circuit relies on the Executive's inherent constitutional power: upholding the district court's judgment in favor of the terror victims would "usurp[]" the Executive's foreign affairs power and "interfere[]" with its power to receive diplomats. Pet. App. 7a. These harms, the appeals court held, are concrete enough to

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[3] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641 (1952) (Jackson, J., concurring).

give the Federal Government constitutional standing to appeal.

But in fact the Government has suffered no harm—and therefore has no standing—because the Constitution simply does not recognize the sort of expansive power that the Executive Branch claims. The Government contends that courts "are *bound* by Executive Branch suggestions" concerning foreign affairs and the interpretation of treaties, and must therefore "defer *completely*."[4] This Court should intervene to limit the damaging consequences of such expansive reasoning. One of the fundamental principles of separation of powers is that "[i]t is emphatically the province and duty of the *judicial department* to say what the law is." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (emphasis added). Thus, in one case after another, this Court has emphasized that it is the responsibility of the *courts* to interpret treaties. It follows that the Executive Branch's claimed injury—that the Judiciary, by interpreting a treaty, is interfering with the Executive's ability to conduct foreign affairs—lacks a constitutional basis, and therefore cannot support Government standing.

The Government's alternative standing argument in the Second Circuit unduly minimizes not only the Judiciary's constitutional role, but also the Legislature's. According to the Government, courts may not "usurp[] the Executive's Article II authority over foreign affairs." U.S. 2d Cir. Br. 16. This argument necessarily implies that general "authority over foreign affairs" belongs exclusively to the Executive to begin with. This is too strong a claim. Rather, like so many functions in the United States government, the Constitution splits foreign relations responsibilities among the branches.

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[4] Brief for United States of America, Intervenor-Appellant-Cross-Appellee, at 14, 16, *Tachiona et al.* v. *Mugabe*, No. 03-6033(L) (2d Cir. Sept. 29, 2005), *available at* 2003 WL 24174513 (emphasis added) [hereinafter "U.S. 2d Cir. Brief"].

And one of the foreign affairs powers that *Congress* has "*without exception*" is "plenary power to make rules for the admission of aliens." *Kleindienst* v. *Mandel*, 408 U.S. 753, 766 (1972) (internal citation and quotation omitted) (emphasis added). Meaning, not only does the Executive Branch have no exclusive power over foreign affairs to be usurped, but in fact *Congress* has authority over the issue at the core of the Government's case: the rules governing the entrance of foreigners—including diplomats—to this country.

Against this background, the Government argued, and the Second Circuit accepted, a claim that the Executive Branch has "exclusive authority to set the terms upon which the United States receives foreign ambassadors." Pet. App. 7a. But as Alexander Hamilton explained in *The Federalist Papers*, this specific power is ceremonial, and "*will be without consequence in the administration of the government.*"[5] Therefore, this power also cannot serve as a foundation for the Government's alleged standing.

Further, the legal theories that the Executive Branch has put forward to justify its alleged standing in this case are precisely the ones that it has tried to use to justify overextending its power in a series of constitutionally suspect activities. Specifically:

- The now discredited so-called "Torture Memo" interpreted the Geneva Convention Against Torture, and its implementing statutes, to allow abuse up to the point of "organ failure, impairment of bodily function, or even death." The Department of Justice wrote in the memo that "[t]he Executive's interpretation is to be accorded the greatest weight in ascertaining a

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[5] THE FEDERALIST, No. 69, at 352 (Garry Wills ed., 1982) (emphasis added).

treaty's intent and meaning."[6] That is virtually identical to the Government's claim in the case at hand: that its interpretation of treaties is binding.

- In *Hamdi* v. *Rumsfeld*, 542 U.S. 507 (2004), this Court rejected the Government's claims that the Executive Branch had unreviewable power to lock up an American citizen. Though this Court in *Hamdi* firmly rejected the Administration's assertion of exclusive power, the Government's arguments in this case are very similar to the ones it made there.

- In its recent memorandum attempting to justify the Government's newly disclosed program of intercepting communications of its citizens without congressional authorization, the Department of Justice wrote that "even in peacetime, the president has *inherent* constitutional authority * * * to conduct searches for foreign intelligence purposes."[7] That is, the Executive is relying on the same exaggerated authority over foreign affairs to justify surveillance of U.S. citizens that it is relying on here to justify its alleged standing.

In justifying these activities the Government relies on arguments very similar to those it advances in this case. This is not a surprise, as each results from specific policies that the Department of Justice has adopted with the precise goal of

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[6] Memorandum from Jay S. Bybee, Assistant Attorney General, to Alberto R. Gonzales, Counsel to the President, on "Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A," at 1, 16 (Aug. 1, 2002), *available at* http://tinyurl.com/dsvnw [hereinafter "Torture Memo"].

[7] Memorandum from U.S. Dep't of Justice, on "Legal Authorities Supporting the Activities of the National Security Agency Described the President," at 6, 8 (Jan. 19, 2006), *available at* http://tinyurl.com/e2528 (emphasis added) [hereinafter "Surveillance Memo"].

expanding Executive Branch power. Significantly, this Court will not commit itself to any decision regarding any of those activities by reviewing this case, given factors present there are not present here. But the converse does not hold—if this Court allows the Second Circuit's opinion to stand, it will have tacitly taken a step towards legitimizing the Government's reasoning in other related circumstances.

This Court should intervene here, in order to protect the separation of powers that has served this nation so well since it declared independence.

ARGUMENT

I. The Government Had No Standing To Appeal Because The Constitution Does Not Exclusively Grant It The Powers It Claims The District Court "Usurped."

The underlying facts of the present case demonstrate that the district court's opinion does not in any way either usurp or threaten the Executive's foreign affairs policy regarding Zimbabwe. The United States Government has been trenchant and forthright in its criticisms of the sort of human rights violations, committed by the defendant political party, which are the subject of this litigation.[8] The Government is rightly outraged by such violations. It makes little sense for the Government to condemn as usurpation or interference the district court's opinion, which enables victims to obtain redress for the very violations of human rights which the Government has condemned.

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[8] See, *e.g.*, U.S. DEP'T OF STATE., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (Released by Bureau of Democracy, Human Rights, and Labor, Feb. 28, 2005), *available at* http://tinyurl.com/fcl4k; Exec. Order No. 13,391, 70 Fed. Reg. 71,201 (Nov. 22, 2005); Exec. Order No. 13,288, 68 Fed. Reg. 11,457 (Mar. 10, 2003).